

DoD Office of General Counsel

Data [Rights] Management - Why You *Should* Care



28 March 2012
2012 Business Acquisition Conference
Samuel A. Novello & Richard M. Gray
DoD Office of the General Counsel
Samuel Mark Borowski
AF Office of the General Counsel



Why Do (Should) You Care?

- **Competition** → not without IP!
- **Return on Investment** → how many times do you want to pay for the same thing?
- **IP is a key element of your Business Case**
- **This is very, very important to Industry**

-
- **Even the hardest IP problem is**



What is Happening?

- **Data Rights - anticipate program needs and prepare EARLY and ALWAYS**
 - **Think about it ... and expressly address in acquisition strategies / plans**
 - **Evaluate Data Rights in source selection**
-



What is NOT Happening?

This effort does NOT create ...

- A rule: always buy all the data all the time***
- Another rule: always get more rights***
- A guarantee: no more sole source***
- ~~A requirement for really hard, really complex source selections~~***



OVERVIEW

- **DoD-Wide Guidance: Better Buying Power**
- **Data Management - what, exactly...**
- **Protecting Your Return on Investment (ROI)**
- **Impact and Management of Life Cycle Cost**
- **Pulling it all together - Open Systems Architecture & Data Rights**



OVERVIEW

■ DoD-Wide Guidance: Better Buying Power

- Data Management- what, exactly...**
- Protecting Your Return on Investment (ROI)**
- Impact and Management of Life Cycle Cost**
- Pulling it all together - Open Systems
Architecture & Data Rights**



Better Buying Power

Promoting Real and Sustained Competition for the Life Cycle



OFFICE

MEMORANDUM FOR

SUBJECT: Better Buying
Defense Spending

On 10/18/11, we
and warfighting in
supporting our forces at
highest priority for the
continuing responsibility
ahead, but we will not
achieve what economists
MORE. This memorandum

Secretary Gates

Initiative, of which this
\$400 billion of the \$700 billion defense budget that is spent annually on contracts for goods
(weapons, electronics, fuel, facilities etc., amounting to about \$200 billion) and services (IT
services, knowledge-based services, facilities upkeep, weapons system maintenance,
transportation, etc., amounting to about another \$200 billion). We estimate that the efficiencies
targeted by this Guidance can make a significant contribution to achieving the \$100 billion
redirection of defense budget dollars from unproductive to more productive purposes that is
sought by Secretary Gates and Deputy Secretary Lynn over the next five years.

Since June, the senior leadership of the acquisition community – the Component
Acquisition Executives (CAEs), senior logisticians and systems command leaders, OSD
officials, and program executive officers (PEOs) and program managers (PMs) – has been
meeting regularly with me to inform and craft this Guidance. We have analyzed data on the
Department's practices, expenditures, and outcomes and examined various options for changing
our practices. We have sought to base the specific actions I am directing today on the best data
the Department has available to it. In some cases, however, this data is very limited. In these
cases, the Guidance makes provision for future adjustments as experience and data accumulate
so that unintended consequences can be detected and mitigated. We have conducted some
preliminary estimates of the dollar savings anticipated from each action based on reasonable and
gradual, but steady and determined, progress against a clear goal and confirmed that they can
indeed be substantial.

Changing our business practices will require the continued close involvement of others.
We have sought out the best ideas and initiatives from industry, many of which have been
adopted in this Guidance. We have also sought the input of outside experts with decades of
experience in defense acquisition.

require open systems architectures
at rules for acquisition of technical data rights.
business case analysis & engineering trade analysis for
open systems architectures and data rights



<https://acc.dau.mil/bbpgovonly>



DoD-Wide Guidance for Open Architecture ***and Technical Data Rights***

- **Emphasis on properly acquiring technical data rights continues in the effort to achieve affordability**
 - **USD(AT&L) Implementation Directive “Better Buying Power - Obtaining Greater Efficiency and Productivity in Defense Spending,” Nov 3, 2010, excerpt:**
 - ***Require open systems architectures and set rules for acquisition of technical data rights: Effective November 15, 2010, you will conduct a **business case analysis**, in consort with the engineering tradeoff analysis that will be presented at MS B. The business case analysis **will outline the open systems architecture approach, combined with technical data rights the government will pursue in order to ensure a lifetime consideration of competition in the acquisition of weapon systems.** The results of this analysis will be reported in the Acquisition Strategy Report and in the competition strategy.***
-



Multiple Parallel Activities (see <https://acc.dau.mil/oa>)

- **The Data Rights Brochure**
 - **DoD Open Systems Architecture Contract Guidebook**
 - See Naval OA Contract Guidebook, v2.0
 - **Business Case Analysis - Guide for Open Systems Architecture & Data Rights**
 - **Update - DoD Instruction 5000.02, Encl. 12, ¶ 9**
 - **Update - Defense Acquisition Guidebook**
 - Chapters 2, 4, 5, 7, 12
 - **Integrate - Defense Acquisition University (DAU) curriculum**
-



Coordinated Suite of Products

DoD BCA Guide & Templates

Open Systems Architecture
(OSA)/Data Rights Business Case
Guide and Templates

Version 1.14
892011

1

2

DoD OA Contract Guidebook



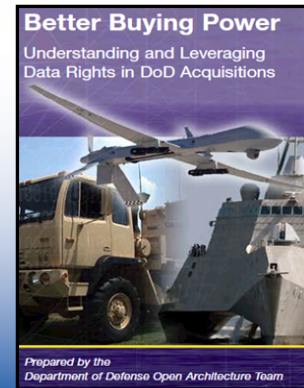
DoD Open Marketplace



3

4

Strategic use of IP

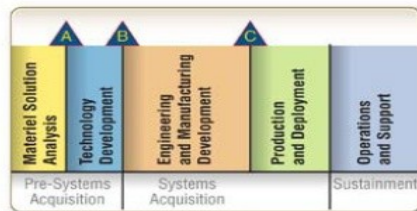




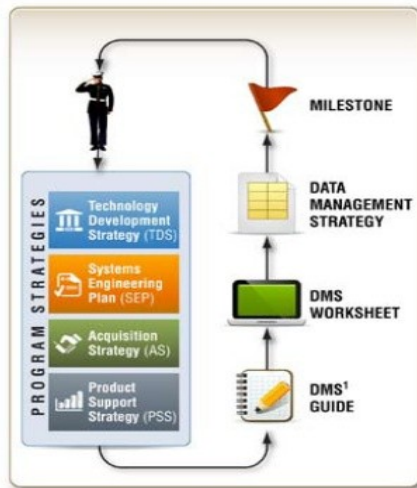
The Data Rights Brochure

Have you developed your Data Management Strategy (DMS)?

Program Managers shall assess the data required to design, manufacture, and sustain the system—including in-house uses, as well as competitive outsourcing—in their sustainment planning and Acquisition Strategies.



The DMS is to be integrated with the program:



¹Army Guide for the Preparation of a Program Product Data Management Strategy

DATA MANAGEMENT AND DATA RIGHTS RESOURCES Laws, Regulations, Policies, and Instructions

- Title 10, U.S. Code, Sections 2320 and 2321
- Defense Federal Acquisition Regulation Supplement (DFARS):
 - 227.71 (Rights in Technical Data)
 - 227.72 (Rights in Computer Software and Computer Software Documentation)
 - 252.227-7013, -7014, -7015, -7018
- OSD Policy Memo, *Clarifying Guidance Regarding Open Source Software (OSS)*, 16 Oct 2009
- DoDI 5000.02, *Operation of the Defense Acquisition System*, Enclosure 12, Section 9, Dec. 2008
- DoD 5010.12-M, *Procedures for the Acquisition and Management of Technical Data*, May 1993 (under revision)

Additional Guidance

- Army Guide for the Preparation of a Program Product Data Management Strategy
- Naval Open Architecture Contract Guidebook for Program Managers
- Acquiring and Enforcing the Government's Rights in Technical Data and Computer Software Under Department of Defense Contracts, Air Force Space and Missile Systems Center

Please visit <https://acc.dau.mil/oa> for additional information and resources



Better Buying Power

Understanding and Leveraging Data Rights in DoD Acquisitions



Prepared by the
Department of Defense Open Architecture Team

July 7, 2011

Statement A



The Data Rights Brochure

Next Page

"Data Rights" → Rights in Technical Data (TD) and Computer Software (CS)

"Data Rights" is a shorthand way to refer to the Government's license rights in two major categories of valuable intellectual property:

- Technical Data (TD) includes any recorded information of a scientific or technical nature (e.g., product design or maintenance data, computer databases, and computer software documentation (CSD)).
- Computer software (CS) includes executable code, source code, code listings, design details, processes, flow charts, and related material.

Anticipating the Need for Data and Data Rights

A Program Manager must ensure that all TD and CS and related license rights required for procurement and sustainment of a system are available throughout the system's life cycle.

- Sustainment activities include reprourement, maintenance, repair, modifications or interfacing/ interoperability activities, and upgrades or technology insertion.
- Consider a Priced Option for any data deliverables or data rights that you may need in the future, but did not order up front.

Identify and Resolve Data and Data Rights Issues Prior to Contract Award

Identify and resolve data delivery or data rights issues prior to contract award, by:

- Requiring Offerors to assert all restrictions on deliverable TD and CS—both commercial and noncommercial—up front, in their proposals;
- Evaluating the data and data rights packages being offered;
- Negotiating for mutually agreeable specialized license rights whenever the standard license categories do not meet both parties' needs; and
- Challenging asserted restrictions if necessary to account for Government investments.

Data Delivery Requirements

The DFARS clauses do not require delivery of TD or CS—the Government must include specific delivery requirements in each contract. For TD, it is important to distinguish detailed design data from less detailed operation or maintenance data. For CS, it is important to distinguish executable code from source code and other design data. Consider a priced option for contingency-based data delivery or data rights needs.

Data Rights Granted to the Government

The Government's license rights to a contractor's TD and CS generally depend upon the extent to which the Government funded the development of the technology, whether the technology is commercial or noncommercial, and any negotiations for mutually agreeable "special" license agreements. Some types of data qualify for Unlimited Rights regardless of development funding, such as "form, fit, and function data," (FFF) and data necessary for operation, maintenance, installation, and training (OMIT) purposes.

Rights Category	Applies to These Types of TD or CS	Rights Criteria	Permitted Uses Within the Government	Permitted Uses by Third Parties Outside the Government ¹
Unlimited Rights (UR)	Noncommercial TD and CS	Developed exclusively at Government expense, and certain types of data (e.g., FFF, OMIT, CSD)	All uses; no restrictions	All uses; no restrictions
Government Purpose Rights (GPR)	Noncommercial TD and CS	Developed with mixed funding	All uses; no restrictions	For "Government Purposes" only; no commercial use
Limited Rights (LR)	Noncommercial TD only	Developed exclusively at private expense	Unlimited; except may not be used for manufacture	Emergency repair or overhaul ²
Restricted Rights (RR)	Noncommercial CS only	Developed exclusively at private expense	Only one computer at a time; minimum backup copies; modification ³	Emergency repair/overhaul; certain service/maintenance contracts ²
Negotiated License Rights	Any/all TD and CS—including commercial TD and CS	Mutual agreement of the parties; use whenever the standard categories do not meet both parties' needs	As negotiated by the parties; however, must not be less than LR in TD and must not be less than RR in noncommercial CS (consult with legal counsel as other limits apply)	
SBIR Data Rights	Noncommercial TD and CS	All TD or CS generated under an SBIR contract	All uses; no restrictions	Cannot release or disclose except to Government support contractors
Commercial TD License Rights	Commercial TD only	TD related to commercial items (developed at private expense)	Unlimited in FFF and OMIT; other rights as negotiated	
Commercial CS Licenses	Commercial CS only	Any commercial CS or CS documentation	As specified in the commercial license customarily offered to the public ⁴	

¹ All third party use under the Government's license is subject to Government authorization. For rights categories other than UR, releases or disclosures to third parties must be accompanied by either the Non-Disclosure Agreement (NDA) from DFARS 227.7103-7 or must occur under a contract containing DFARS 252.227-7025. A notice requirement also applies to releases of LR data and RR software.

² In addition to the footnote 1 NDA and notice requirements, all authorized Covered Government Support Contractor recipients of LR data or RR software must sign an NDA directly with the owner of the data/software, unless the direct-NDA requirement is waived by the owner.

³ See DFARS 252.227-7014(a)(15) (March 2011) (or (a)(14) in previous versions) for more information.

⁴ Such license must be consistent with Federal procurement law and satisfy user needs.



Technical Data Rights: Information for the Program Manager

- **Question 1: What are some of the most important considerations for the Program Manager to consider with regard to acquiring technical data rights while maintaining an affordable program?**

 - **Answer 2: Four cardinal rules:**
 - **Anticipate and plan for sustainment over the entire system life cycle**
 - **Ensure Return on Investment (ROI) for USG-funded development**
 - **Don't make an unnecessary "grab" for proprietary data/rights**
 - **Do it EARLY and ALWAYS: evaluation of data/rights in source selection**
-



Rule 1: Anticipate and plan for sustainment over the entire system life cycle

- **Data and license rights are necessary for critical sustainment activities, including :**
 - **reprocurement of additional systems or spares;**
 - **maintenance;**
 - **repair;**
 - **modification or interfacing or interoperability with other systems; and**
 - **upgrades or technology insertion**

 - **Data and license rights are needed for both in-house and competitively outsourced activities.**

 - **When in doubt: consider a PRICED OPTION for data and associated license rights**
-



Rule 2: Ensure Return on Investment (ROI) for USG-funded development

- **The MOST expensive way to acquire technology or IP is to develop it yourself**
 - **And then pay for the right to use it again . . . and again . . . and again**
 - **IP rights are the "reward" for those who invest, risk, and ... come up with something cool**
 - **If the USG has paid for development → it MUST take steps to ensure ROI**
 - **Example: Require delivery of data related to any/all technology developed under the contract. Period.**
 - **The Challenge: finding a way to retrieve and SHARE the good stuff when you need it, or it's relevant**
-



Rule 3: Don't make an unnecessary "grab" for proprietary data/rights

- **DoD Policy: acquire only the MINIMUM**
 - **Data deliverables, and**
 - **Data rights ...**
 - . . . that are necessary to meet your needs**
 - **No "inherent" value in acquiring a bunch of data or rights -- If you can't . . .**
 - **. . . Make your "Business Case"**
 - **When in doubt: consider a PRICED OPTION**
-



Rule 4: Do it EARLY and ALWAYS -- evaluation of data/rights in source selection

- **Mandatory PRE-Award Assertion of Restrictions (for non-commercial)**
 - **USG must supplement for commercial stuff**
 - **Delivery requirement (or option) is the trigger**
 - **MUST include data deliverables and rights as an EVALUATION FACTOR in source selection**
 - **Both competitive and sole source awards**
 - **Do NOT be (too) afraid of 10 U.S.C. 2320(a)(2) (F)**
-



The 800lb Gorilla

- **10 U.S.C. 2320(a)(2)(F)** A contractor or subcontractor (or a prospective contractor or subcontractor) may not be required, as a condition of being responsive to a solicitation or as a condition for the award of a contract—
 - (i) to sell or otherwise relinquish to the United States any rights in technical data except—
 - (I) *rights in technical data described in subparagraph (A) for which a use or release restriction has been erroneously asserted by a contractor or subcontractor ;*
 - (II) rights in technical data described in subparagraph (C); or
 - (III) under the conditions described in subparagraph (D); or
 - (ii) to refrain from offering to use, or from using, an item or process to which the contractor is entitled to restrict rights in data under subparagraph (B).
- **DFARS: 227.7103-1(c) & (d), 227.7203-1(c) & (d)**



Ok... more from 10 USC 2320(a) (2)

- (A) In the case of an item or process that is developed by a contractor or subcontractor **exclusively with Federal funds** (other than an item or process developed under a contract or subcontract to which regulations under section 9(j)(2) of the Small Business Act (15 U.S.C. 638(j)(2)) apply), the United States shall have the unlimited right to--
 - (i) use technical data pertaining to the item or process; or
 - (ii) release or disclose the technical data to persons outside the Government or permit the use of the technical data by such persons.
- (B) Except as provided in subparagraphs (C) and (D), in the case of an item or process that is developed by a contractor or subcontractor **exclusively at private expense**, the contractor or subcontractor may restrict the right of the United States to release or disclose technical data pertaining to the item or process to persons outside the government or permit the use of the technical data by such persons.
- (C) Subparagraph (B) does not apply to technical data that--
 - (i) constitutes a correction or change to data furnished by the United States;
 - (ii) relates to form, fit, or function;
 - (iii) is necessary for operation, maintenance, installation, or training (other than detailed manufacturing or process data) [("OMIT" data)]; or
 - (iv) is otherwise publicly available or has been released or disclosed by the contractor or subcontractor without restriction on further release or disclosure.
- (D) Notwithstanding subparagraph (B), the United States may release or disclose technical data to persons outside the Government, or permit the use of technical data by such persons, if--
 - (i) such release, disclosure, or use--
 - (I) is necessary for **emergency repair and overhaul**; or
 - ***(II) is necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes; or***
 - ***(III) is a release or disclosure of technical data (other than detailed manufacturing or process data) to, or use of such data by, a foreign government that is in the interest of the United States and is required for evaluational or informational purposes;***
 - (ii) such release, disclosure, or use is made subject to a [Non-Disclosure] prohibition that the person to whom the data is released or disclosed may not further release, disclose, or use such data; and
 - (iii) the contractor or subcontractor asserting the restriction is **notified** of such release, disclosure, or use.



What does all this mean?

- **Evaluation vs. Condition of responsiveness/award**
 - **Primarily directed to RIGHTS ... vice deliverable**
 - **But see policy restrictions regarding commercial deliverables**
 - **Exceptions to the prohibition**
 - **Statutory carveouts -**
 - **Unlimited Rights in special types of data: OMIT & FFF**
 - **Right to release in special circumstances: emergency repair & overhaul, *segregation & reintegration, certain types of support contractors***
 - **Mandatory vs. voluntary/arms-length negotiation**
 - **Issue: Evaluation factors as “de facto” condition of ...**
-



Contractor Assertion of Restrictions - Early Identification & Marking

- **Step 1: Early identification -- notice of assertions**
 - **Pre-Award - with the Proposal**
 - **Post-Award Update**
 - **Current DFARS - not required for commercial!**
- **Step 2: Marking requirements**
 - **A FAILURE to mark → → Unlimited Rights**
 - **Contractor's obligation to mark, in order to “perfect” their assertions**
 - **Government’s obligation to CONFIRM marking is accurate → AS PART of inspection/acceptance**
 - **Noncommercial technology: legends are specified word-for-word**
 - **Commercial technology:**
 - **TD: any restrictive notice is allowed (commercial practices?)**
 - **CS: no express req’t the DFARS (likely: shrink-wrap, click-wrap, run-time, etc)**



Source Selection - the "Musts"

- **Data Deliverable:** you must CREATE delivery requirements
 - When in doubt - OPTIONS
 - Priced [option] CLINs (if NSP, then "exercise" the option upfront)
- **Data Rights:** require Offeror to ASSERT restrictions UP-FRONT
 - Standard clause for NONcommercial (DFARS 252.227-7017)
 - you MUST supplement this requirement for commercial
- **Explanation of the proposal** - Offeror explanation of data rights elements - how delivery/rights affect other aspects of the effort
- **Evaluation:** Data/software delivery and rights MUST be evaluated
- **Interest-based negotiations,** flexibility ... but stand firm on
 - data needed for requirements (be sure to consider non-data alternatives)
 - Return on Investment



Tactical Considerations

- **How to Define the delivery requirement**
 - **Traditional:** specification of detail, content, format (CDRLs, etc)
 - **Performance-based:** "data necessary for [X]"
 - **Multiple classes!!!**

 - **How to define the license rights needed ... wanted?**
 - **Analogous to delivery req't - specification vs. perf-based**
 - **Note:** cannot REQUIRE greater rights in proprietary
 - **Multiple "classes"**

 - **Data Rights as stand-alone, or integrated w/other factors**
 - **Maybe a little of both?**
-



Tactical Considerations

- **Encourage voluntary negotiations**
 - **Evaluating the "impact on other evaluation factors"**
 - **DFARS 227.7103-10(a)(5) and -7203-10(a)(5):**
 - **"(5) Information provided by offerors in response to the solicitation provision may be used in the source selection process to evaluate the impact on evaluation factors that may be created by restrictions on the Government's ability to use or disclose technical data. However, offerors shall not be prohibited from offering products for which the offeror is entitled to provide the Government limited rights in the technical data pertaining to such products and offerors shall not be required, either as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish any greater rights in technical data when the offeror is entitled to provide the technical data with limited rights."**
 - **Life cycle support**
 - **Cost of future production, support, upgrade due to lack of competition**
 - **Technical risk - interoperability b/t proprietary systems**
 - **Note: "open architecture" can mitigate these issues**
 - **Best Value - what are you getting for your money?**
 - **Example: Same tech, same price . . . But more data rights**
 - **Tech - Cost Tradeoff vs. Low Price Technically Acceptable**
-



Technical Data Rights: Information for the Program Manager

- **Question 2. What are some of the most recent and important statute/policy changes and lessons learned that will impact Program Managers with regard to TDR and affordability?**
- **Answer 2. There have been revisions to the DoD-specific technical data statutes in the NDAA's *every year* since 2007 -**
 - **Most of these are implemented through changes to the **DFARS**, and or other DoD acquisition policies, procedures, and guidance ... lets' take a look...**



Overview of the Changing Legal Landscape -- Chronologically

- **FY 2007: § 802**
 - (a) Assess data reqts in all Acq Strategies
 - (b) Presume development at Govt expense for major systems
 - **FY 2008: § 815(a)(2) → COTS exception to 802(b)**
 - **FY 2009: § 822 → data rights for "non-FAR" agreements**
 - **FY 2010: § 821 → Support contractor access to data...**
 - **FY 2011: § 824 → IR&D funding & erroneous assertions**
§ 801 → Litigation support contractor access...
 - ***FY 2012: § 815 → IR&D, deferred ordering, segregation & reintegration data, validating assertions***
§ 802 → Litigation support contractor access... expanded
-



Overview of the Changing Legal Landscape -- Chronologically

- **FY 2007: § 802**

- (a) Assess data reqts in
- (b) Presume development systems

- **FY 2008: § 815(a)(2) → C**

- **FY 2009: § 822 → data right**

- **FY 2010: § 821 → Support**

- **FY 2011: § 824 → IR&D**
§ 801 → Litigation support

- **FY 2012: § 815 → IR&D, defense reintegration**
§ 802 → Litigation support

NOTE:

The Background Slides include a summary of each of these sections, and details regarding the status of the DoD / DFARS implementation -- for review at your convenience



Overview of the Changing Legal Landscape -- By Subject Matter *Focus*

THREE PRIMARY "TRACKS" FOR THESE CHANGES

1. Acquisition Strategies & planning

- FY 2007: § 802(a) Assess data reqts in all Acq Strategies
- FY 2009: § 822 → data rights for "non-FAR" agreements

2. Release to Support Contractors . . . Necessary to support USG operations

- FY 2010: § 821 → Support contractor access to data...
- FY 2011: § 801 → Litigation support contractor access...
- **FY 2012: § 802** → *Litigation support contractor access... expanded*

3. Re-capturing competition in Legacy Programs / During Sustainment

- FY 2007: § 802(b) Presume development at Govt expense for major systems
- FY 2008: § 815(a)(2) ☑ COTS exception to 802(b)
- **FY 2012: § 815** → *IR&D, deferred ordering, segregation & reintegration data, validating erroneous or fraudulent assertions*



Focus: FY12 NDAA - Section 815

- **New “Type” of Data: Necessary for Segregation & Reintegration**
 - Exception to restrictions on release outside USG - even if 100% privately developed
 - Included in the new deferred ordering scheme
 - **Deferred Ordering PLUS!**
 - No time limit (current limit is 3yrs after contract (DFARS 252.227-7027))
 - Data generated or utilized under contract (current = only generated)
 - DoD must determine that the data meets BOTH of the following:
 - Necessary for procurement or sustainment of major/weapon system or noncommercial
 - And is either: paid whole/part by USG --or- segregation /reintegration data
 - **Validation of Asserted Restrictions**
 - Challenge period is now 6 years after contract (current = 3yrs)
 - No time limit for assertions based on fraud
 - **Housekeeping**
 - Government Purpose Rights (GPR) is default for mixed funding
 - Repeal FY11 § 824’s attempted slaughter of IR&D rules
-



Focus: FY12 NDAA - Section 815

(cont'd)

■ **Deferred Ordering “Plus” - new par (b)(9) added to 10 U.S.C. § 2320**

“(9) providing that, in addition to technical data that is already subject to a contract delivery requirement, the United States may require at any time the delivery of technical data that has been generated or utilized in the performance of a contract, and compensate the contractor only for reasonable costs incurred for having converted and delivered the data in the required form, upon a determination that—

“(A) the technical data is needed for the purpose of procurement, sustainment, modification, or upgrade (including through competitive means) of a major system or subsystem thereof, a weapon system or subsystem thereof, or any noncommercial item or process; and

“(B) the technical data—

“(i) pertains to an item or process developed in whole or in part with Federal funds; or

“(ii) is necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes;”



Non-Statutory DFARS Cases

- **DFARS Case 2010-D001: DFARS Part 227 "Transformation" (a.k.a. "227 Rewrite")**
 - **Proposed Rule: 75 FR 59412 (Sept 27, 2010)**
 - **Comment Period Extended: 75 FR 72777 (Nov 26, 2010)**
 - **Queued up after the "statutory cases"**

 - **DFARS Case 2010-D007: Use of Draft Technical Data**
 - **Emerging issue - re rights/markings for --**
 - **... Draft or in-progress reviews**
 - **... Remote access ... informal or as delivery**
 - **Closed to a Holding File: DFARS 2011-H018.**
-



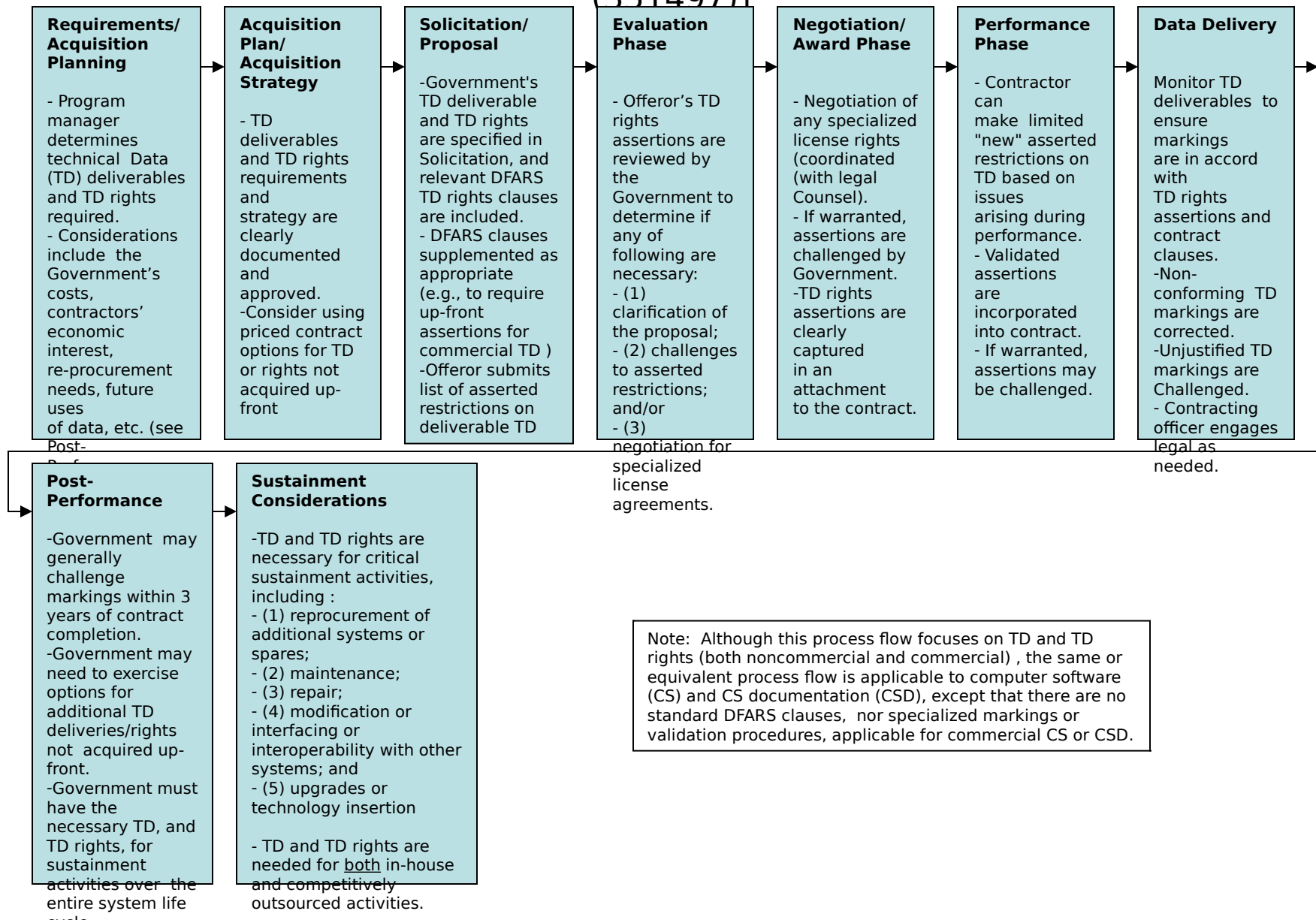
Technical Data Rights: Information for the Program Manager

- **Question 3. How can we better prepare Program Managers and PM staffs on making the most informed decision with regard to TDR and affordability?**

- **Answer 3: Training, training, training. And requiring affirmative treatment of data delivery and license rights issues -**
 - **During EVERY single source selection, and**
 - **Throughout the ENTIRE technology life cycle.**

Figure X: Data and Data Rights Acquisition Process Flow

[Prepared for GAO Review of "DoD Acquisition of Technical Data"
(351497)]





OVERVIEW

- DoD-Wide Guidance: Better Buying Power
 - **Data Management - what, exactly...**
 - Protecting Your Return on Investment (ROI)
 - Impact and Management of Life Cycle Cost
 - Pulling it all together - Open Systems Architecture & Data Rights
-



DODI 5000.02

- ENCL. 12, SYSTEMS ENGINEERING

9. DATA MANAGEMENT AND TECHNICAL DATA RIGHTS

a. **Program Managers for ACAT I and II programs**, regardless of planned sustainment approach, shall assess the long-term technical data needs of their systems and reflect that assessment in a Data Management Strategy (DMS). The DMS shall:

(1) **Be integrated with other life-cycle sustainment planning** and included in the Acquisition Strategy;

(2) Assess the data required to **design, manufacture, and sustain the system, as well as to support re-competition for production, sustainment, or upgrades**; and

(3) Address the merits of including a priced contract option for the future delivery of technical data **and intellectual property rights** not acquired upon initial contract award and shall consider the contractor's responsibility to verify any assertion of restricted use and release of data.

b. The DMS shall be approved in the context of the Acquisition Strategy prior to issuing a contract solicitation.



DOD ACQUISITION CONTRACTS

- **Rights in Inventions & Patents → FAR Part 27**
 - **Subject Inventions - mandatory, non-negotiable**
 - **Background Inventions - no coverage**

- **Rights in Technical Data (TD) and Computer Software (CS) → DFARS Part 227**
 - **Data Deliverable vs. Data Rights**
 - **Commercial vs. Non-commercial**
 - **Negotiation vs. standard or “default” licenses**
 - **Standard licenses based on who funded the development of technology → the more you pay, the more you get**



WHY DOES INTELLECTUAL PROPERTY SEEM SO HARD TO UNDERSTAND?

- **Traditionally: DoD-unique, and DoD-funded**
 - Always get all the data, and all the rights, all the time

 - **1990's Acq Reform: use commercial & non-developmental items (NDI)**
 - Never get the data (or only the fluff), and "no" rights as the rule

 - **Today: reality is a that it's a MIX of both**
 - DoD adaptation to commercial/NDI
 - Integration of commercial/NDI into DoD systems
-



Overview - Data Rights ...

- **Tech Data vs. Computer Software**
 - **Deliverables vs. Data Rights**
 - **License Rights**
 - **Noncommercial technologies**
 - **Commercial technologies**
 - **Doctrine of Segregability (divide & conquer!)**
 - **Negotiated Licenses**
 - **Subcontracting issues**
 - **Data Rights in Source Selection!!!!**
-



Data Deliverables vs. Data Rights

■ **Data Deliverables**

- The specific technical data or computer software that is required to be delivered or otherwise provided to the Government under the contract

■ **Data Rights**

- The legal right to use, reproduce, modify, perform, display, release, disclose the TD or CS

■ **The DFARS clauses → NO delivery requirements!!!!**

■ **Note: "Inchoate Rights" → what a waste of money!**

- DoD acquiring SIGNIFICANT data rights in TD or CS that is NOT delivered (a required deliverable)
-



License Rights in TD & CS

- **"Hybrid" license - covers specific activities**
 - Use; modify; reproduce; perform; display; release or disclose; and ... access? (Ok, this one is a new entry)
 - **Rights Determined in THREE primary ways**
 - By negotiation - mutual agreement
 - By "default": funding for development; type of deliverable; commercial technology?; data vs. software
 - Commercial Software: we use THEIR license as baseline
 - **Doctrine of Segregability (a.k.a. "divide & conquer"):**
 - Rights determined at the "lowest practical segregable level"
 - Usually - allows contractor to "fence off" privately developed
 - Risk: "cherry picking" → when a small proprietary module restricts competitive options for the rest of the system
 - ***BUT SEE Section 815 of FY12 NDAA ...***
-



LICENSE RIGHTS IN TECHNICAL DATA & COMMERCIAL SOFTWARE

- **"Hybrid" license - covers specific activities**
 - Use; modify; reproduce; perform; display; release or disclose
 - ... what about access?
 - **Rights Determined in THREE primary ways**
 - By negotiation - mutual agreement
 - By "default":
 - **funding for development;**
 - type of deliverable;
 - commercial technology?
 - Commercial Software: we use THEIR license as baseline
 - **Doctrine of Segregability (a.k.a. "divide & conquer"):**
 - Rights determined at the "lowest practical segregable level"
-



OVERVIEW

- **DoD-Wide Guidance: Better Buying Power**
 - **Data Management- what, exactly...**
 - **Protecting Your Return on Investment (ROI)**
 - **Impact and Management of Life Cycle Cost**
 - **Pulling it all together - Open Systems Architecture & Data Rights**
-



LICENSE RIGHTS IN TECHNICAL DATA & COMMERCIAL SOFTWARE

General Rule: The Rights "Follow the Money"

- **100% GOVT Funded → Unlimited Rights (UR)**
 - **Mixed GOVT-Private → GOVT Purpose Rights (GPR)**
 - **100% Private → Limited Rights (LR) (for TD)
Restricted Rights (RR) (for CS)**
 - **Note: Commercial TD ~LR → Presumption of ...Private Expense**
 - **BUT - Doctrine of Segregability!!!**
-



NON-COMMERCIAL TECHNICAL DATA & COMMERCIAL SOFTWARE LICENSES

	In-house Rights*	Out-house Rights*
Unlimited Rights (UR)	Unlimited. No kidding.	
GOVT Purpose Rights (GPR)	Unlimited	Only GOVT Purposes; no commercial use
Limited Rights (LR) or Restricted Rights (RR)	~Unlimited – except no use for manufacture	Only Emergency repairs; some software maintenance
Specially Negotiated License Rights	Anything by mutual agreement (but not less than LR or RR)	

**** Rights → to use, reproduce, modify, perform, display, release, and disclose***

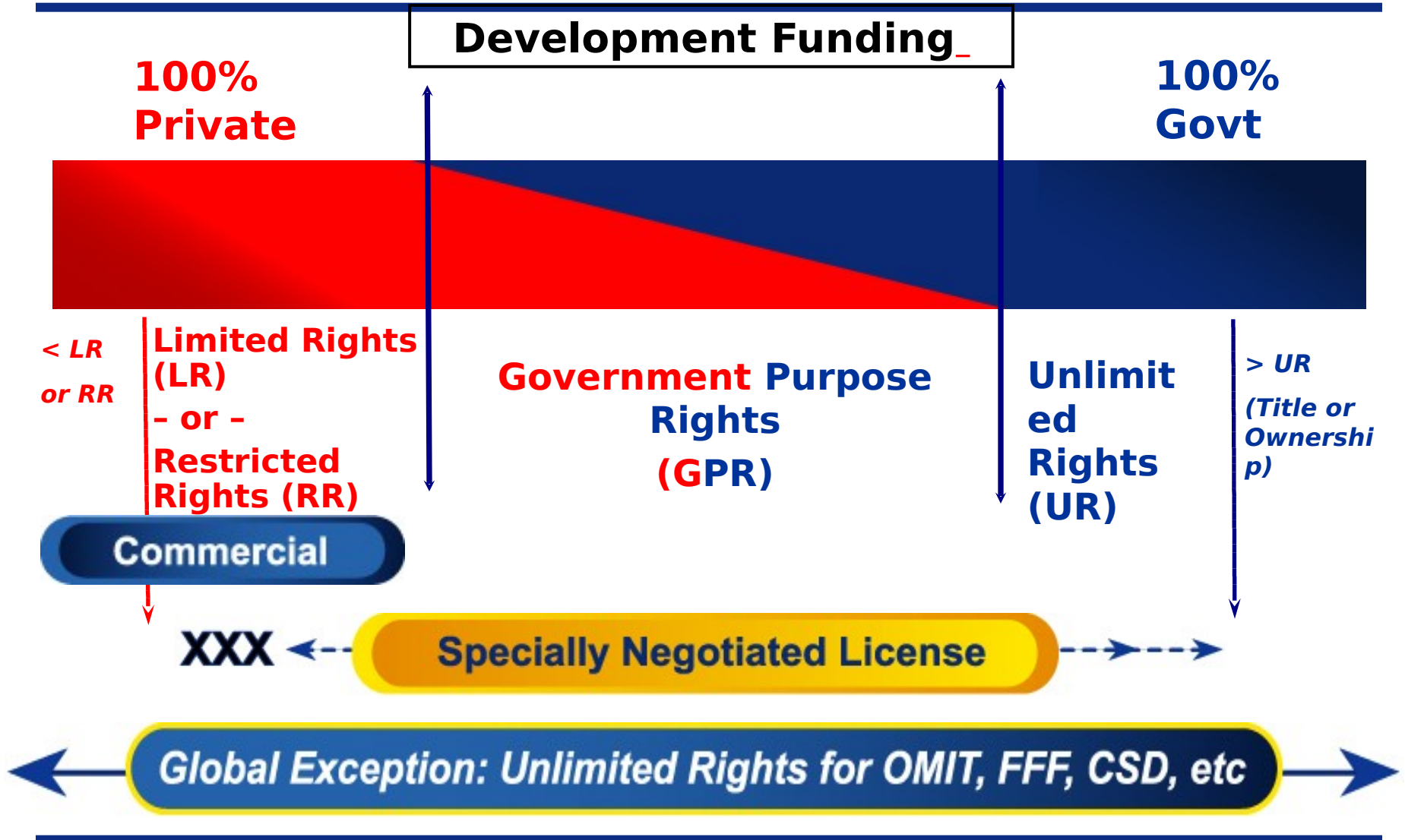


COMMERCIAL TECHNICAL DATA & COMMERCIAL SOFTWARE LICENSES

	In-house Rights*	Out-house Rights*
Unlimited Rights (UR) (only certain types of TD)	Unlimited. No kidding.	
Normal Commercial License (for CS ... <i>only?</i>)	"Standard" license for other customers – provided it is OK under Federal law ... <i>and</i> meets agencies needs	
Standard "7015" Clause" Rights (~Limited Rights -- for TD only)	~Unlimited – except no use for manufacture	Only Emergency repairs
Specially Negotiated License Rights	Anything by mutual agreement (but not less than the Standard ~ Limited Rights in TD)	
<u>Rights → to use, reproduce, modify, perform, display, release, and disclose</u>		



All-in-One





LICENSE RIGHTS IN TECHNICAL DATA & COMMERCIAL SOFTWARE

Doctrine of Segregability

... Severability?

(How about "Divide and Conquer"?)

- **Rights determined at the "lowest practical segregable level"**
 - **Hardware: Subsystem, component, or sub-component**
 - **Software: module or even subroutine!**

 - **Cherry picking and swiss cheese . . . *Mmm, mmm***
-



LICENSE RIGHTS IN TECHNICAL DATA & COMMERCIAL SOFTWARE

Doctrine of ... "Divide and Conquer"?

- **Examples: DoD modification of a Commercial or Proprietary Technology**
 - **Aerial Refueling: Comm Deriv A/C w/a tail boom**
 - **Enhanced Engine: Commercial w/improved efficiency**

- **Example: Integration of Comm/Proprietary into an existing DoD system**
 - **Radar/Communications: Technology Refresh**
 - **Note: maybe even replacing the whole system ... change in culture for supporting**



WHAT QUESTIONS SHOULD I ASK ABOUT DATA RIGHTS?

- **A data rights assessment should answer:**
 - **Does the Government already have data rights in existing software or other deliverables that permit the Government to leverage that existing software for this new contracting effort?**
 - **What are the benefits of broader data rights clauses? For example, will requiring more than restricted/limited rights impact competition or procurement cost without providing value?**
 - **Will the Government obtain at least Government Purpose Rights? If not, is the asset isolated at the lowest component level? If not, is it non-critical? If not, what is the justification for less than GPR?**
 - **Does the program require the rights to modify (update, correct, enhance, etc.) the deliverables now or in the future?**
 - **Will the Government need to use special licenses? For example, to allow third parties to use or reuse GPR repository assets for a limited basis to support evaluation for potential employment in a proposed solution.**



HOW DO I KNOW WHAT I AM BUYING AND WHAT SHOULD I HAVE DELIVERED?

- **DFARS 252.227-7014(a)(4) Computer software means**
 - **computer programs,**
 - **source code,**
 - **source code listings, object code listings,**
 - **design details,**
 - **algorithms, processes, flow charts, formulae, and**
 - **related material that would enable the software to be reproduced, recreated, or recompiled**
- **Are you procuring source code?**
- **Are you procuring “software build” and build tools? Critical for reuse**
- **Are you procuring form, fit and function data for Proprietary Solutions to “black box” parts of your open architecture?**
- **Are you procuring modular software at the component level?**
- **Are you procuring design documentation and other technical data at the component level?**



DATA RIGHTS ARE A KEY ELEMENT TO YOUR RETURN ON INVESTMENT

- **Program used a GSA services contract to modify software. Contract contained no data rights clauses. Contractor asserted no government rights even though government paid 100% for modifications.**
- **Service used a service contract to obtain intranet. Near the end of the contract, the government's data rights became a significant issue**
- **Defense Business System delivery of core software with appropriate data rights became key to service implementation**



OVERVIEW

- **DoD-Wide Guidance: Better Buying Power**
 - **Data Management- what, exactly...**
 - **Protecting Your Return on Investment (ROI)**
 - **Impact and Management of Life Cycle Cost**
 - **Pulling it all together - Open Systems Architecture & Data Rights**
-



WHY DO INTELLECTUAL PROPERTY RIGHTS SEEM SO HARD?

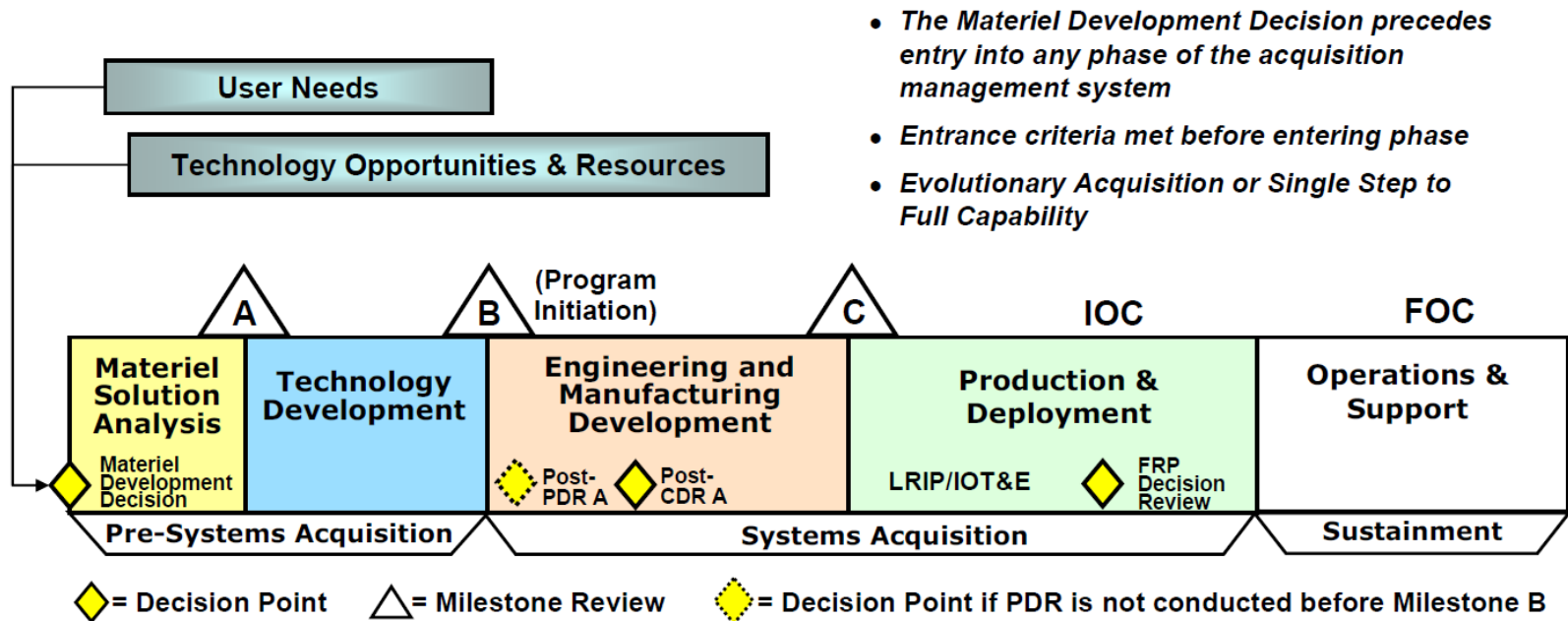
Timing is Everything ...

- **Technology Life Cycle**
 - **Development**
 - **Production**
 - **Deploy/operate**
 - **Maintenance - preserving or restoring the original/intended operating capability**
 - **Upgrade & Technology Refresh - adding/enhancing the operational capability**
 - **IP first takes hold at the Development stage**
 - **IP first affects DoD only at OUR first use/acquisition of the tech**
 - **But do we even notice?**
 - **After first use/acquisition → EVERY remaining life cycle activity is affected**
-



DoD Instruction 5000.02

Figure 1. The Defense Acquisition Management System.





CONTRACTOR ASSERTION OF RESTRICTIONS - EARLY IDENTIFICATION & MARKING

- **Early identification -- notice of assertions**
 - **Pre-Award - with the Proposal**
 - **Post-Award Update**
 - **Current DFARS - not required for commercial!**

- **Marking requirements.**
 - **Always, always, always**
 - **Contractor's obligation**
 - **Noncommercial are specified word-for-word**
 - **Commercial - any notice (best practices)**



DODI 5000.02 - ENCL. 12, SYSTEMS ENGINEERING

9. DATA MANAGEMENT AND TECHNICAL DATA RIGHTS

- a. **Program Managers for ACAT I and II programs**, regardless of planned **sustainment approach**, shall assess the long-term technical data needs of their systems and **reflect that assessment** in a Data Management Strategy (DMS). The DMS shall:
- (1) **Be integrated with other life-cycle sustainment planning** and included in the Acquisition Strategy;
 - (2) Assess the data required to **design, manufacture, and sustain the system, as well as to support re-competition for production, sustainment, or upgrades**; and
 - (3) Address the merits of including a priced contract option for the future **delivery of technical data and intellectual property rights** not acquired upon initial contract award and shall consider the contractor's responsibility to verify any assertion of restricted use and release of data.
- b. The DMS shall be approved in the context of the Acquisition Strategy prior to **issuing a contract solicitation**.



OVERVIEW

- **DoD-Wide Guidance: Better Buying Power**
 - **Data Management- what, exactly...**
 - **Protecting Your Return on Investment (ROI)**
 - **Impact and Management of Life Cycle Cost**
 - **Pulling it all together -
Open Technology
Development &
Architecture**
-



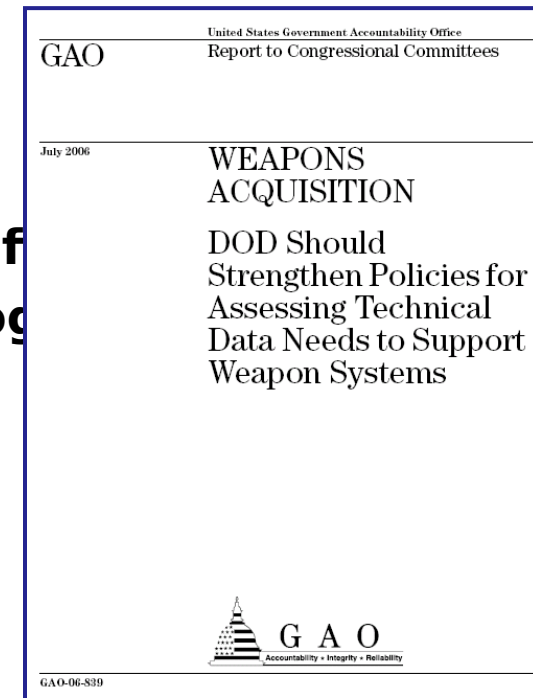
Why are OSA/Data Rights Important?

- **What you decide may last the whole life cycle:**
 - **Maintain potential for competition**
 - **Flexibility in logistical support**
- **Will enable you to:**
 - **Take advantage of emerging technologies**
 - **Quickly introduce new capabilities to war f**

GAO findings:

...Services encountered limitations in sustainment plans for some fielded weapon systems...lack of data rights.

...60% of 47 non-competitive DoD contracts could not be competed...lack of access to data





Definitions

- **Open Systems Architecture - technical architecture**
 - **Open standards, publishing of key interfaces, full design disclosure**
 - **Modular, loosely coupled and highly cohesive system structure**
 - **OSA - the Open Business Model**
 - **Transparency and leveraging of innovation across the Enterprise**
 - **Sharing risk, asset reuse and reduced total ownership costs**
 - **Data Rights = License for Technical Data and Computer Software**
 - **Vendor Lock - Can't bring in new players or exercise acquisition choices**

 - **A Successful Open System Architecture can be;**
 - **Added to**
 - Replaced
 - Supported
 - **Modified**
 - Removed

 - **. . . by different vendors throughout the life cycle**
-



Coordinated Suite of Products

DoD BCA Guide & Templates

*Open Systems Architecture
(OSA)/Data Rights Business Case
Guide and Templates*

*Version 1.14
892011*

1

2

DoD OA Contract Guidebook



DoD Open Marketplace



3

4

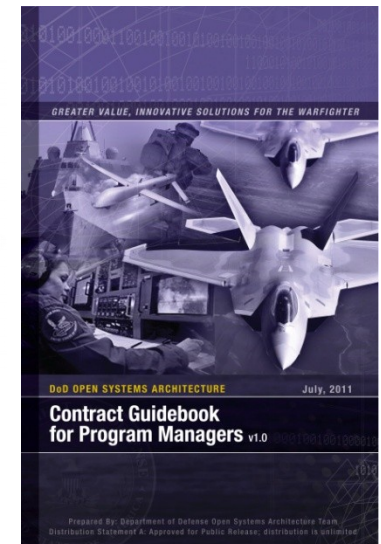
Strategic use of IP Rights





History of the Contract Guidebook

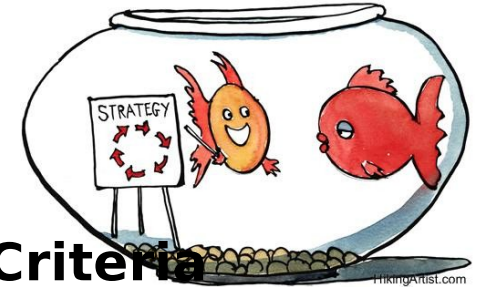
- **Version 1.0 - 05 July 2006**
- **Proven language over the Enterprise**
- **Billions of dollars in contract awards**
- **Incorporated into “Better Buying Power”**
 - All services provided input
 - Authored and owned by Navy
- **Compendium of best practices - We need your ideas**
- **DoD-level guidance**
 - <https://acc.dau.mil/osaguidebook>
 - **DAG appendix - coming soon**





The DoD OSA Contract Guidebook for PMs can help you

- **Leverage the Consistent message to Industry**
- **Reduce your Risk in contracting**
 - **Statement of Work**
 - **Deliverables**
 - **Instructions to Offerors and Grading Criteria**
- **Understand what to look for to get OSA Products**
- **Leverage Intellectual property/Data rights for the life cycle**
- **Capture OSA Best Practices for your program**
 - **Early and Often Design Disclosure**
 - **Breaking vendor lock**
 - **Peer reviews for technology evaluation**
 - **Minimize duplication/Maximize Enterprise value**





DOD OSA CONTRACT GUIDEBOOK FOR PROGRAM MANAGERS (v.0.1 Dec 2011)

-
- Chapter I: Recommendations For Section C (Statement of Work) Language
 - Chapter II: Developing Contract Line Item Numbers (Clins) –
 - Chapter III: Examples Of Section H (Special Contract Requirements) Language
 - Chapter IV: Recommendations For Section L (Instructions To Offerors) Language
 - Chapter V: Recommendations For Section M (Evaluation Criteria) Language
 - Chapter VI: Recommendations For Incentivizing Contractors
 - Appendices
 - Appendix 1: RECOMMENDED CDRL AND DELIVERABLE ITEMS
 - Appendix 2: OSA CHECKLIST (Short)
 - Appendix 3: OSA CHECKLIST (Long)
 - Appendix 4: RECOMMENDED DATA LANGUAGE FOR CODE HEADERS
 - Appendix 5: OPEN SOURCE SOFTWARE
 - Appendix 6: GLOSSARY OF TERMS
 - Appendix 7: ASSESSING A PROGRAM'S [IP] RIGHTS NEEDS & DEVELOPING A DATA RTS STRATEGY (DRS)
 - Appendix 8: CLICKWRAP OR EMBEDDED LICENSE ISSUES
 - Appendix 9: BETTER BUYING POWER: UNDERSTANDING AND LEVRAGING DATA RTS IN DoD ACQUISITIONS
 - Appendix 10: BREAKING And AVOIDING VENDOR LOCK
 - Appendix 11: SAMPLE CONTRACT DATA REQUIREMENTS LISTS (CDRLs)
-



Approaches to Breaking Vendor Lock





ACQUIRING APPROPRIATE DATA RIGHTS ENABLES THE GOVERNMENT TO IMPLEMENT OPEN ARCHITECTURE PRINCIPLES

- **Disclose designs early and often**
- **Re-use previously procured components**
- **Enhance interoperability**
- **Re-compete contracts for systems in a full and open manner**
- **Enhance life-cycle affordability**



WHAT ARE THE BENEFITS OF AN OPEN ARCHITECTURE?

- ❑ Marks a shift from monolithic to modular software/hardware/systems development**
- ❑ Ends the contractor's ability to lock the Government into a proprietary architecture**
- ❑ Requires industry to build a product to a common architecture**
- ❑ With modularity and commonality products can be used on multiple platforms**
- ❑ With modularity, services can reuse existing software and provide for component level competitions**



PILLARS OF OPEN ARCHITECTURE

- **Define and follow an open systems approach**
- **Develop an open layered, modular architecture**
- **Describe rationale for modular choices**
- **Ensure system requirements are accounted for**
- **Document and model the component**
- **Minimize inter-component dependencies**
- **Support rapid, affordable technology insertions**
- **Use Commercial-Off-the-Shelf (COTS) products**
- **Employ open, published standards**
- **Define interfaces between modules, components, and subcomponents**
- **Limit use of proprietary or vendor-unique elements**
- **Negotiating appropriate intellectual property rights and patent rights**
- **Reusing pre-existing or common components**
- **Supporting third-party development to foster collaboration and competition**
- **Promote the identification of multiple sources of supply and promote flexible business strategies**



WHAT ARE MY “TAKE AWAYS?”

- **Modularity and use of an open architecture will allow for elements of warfare system contracts to be competed**
- **Re-use will require validation of markings on software/data deliverables from current programs and/or contract modifications to require source code deliverables**
- **“Openness” and “data rights” will play a greater role in best value determinations**
- **Request to use GFI/GFE for IRAD projects may need to take into account affect on system architecture and need for interface code or other IP related rights**
- **SBIR topics and Phase II and Phase III awards impact to OA will need to be examined**
- **Guidebook language will need to be tailored for each procurement**



Questions?

**Department of Defense
Office of the Deputy General
Counsel (Acquisition &
Logistics)**

Samuel A. Novello

Direct: 703-571-9456

samuel.novello@osd.mil

Richard M. Gray

Direct: 703-695-5679

richard.gray@osd.mil





BACKUP SLIDES



WHY I "SHOULD CARE" ABOUT DATA MANAGEMENT

- **Open Technology Development - Roadmap Plan, April 2006, Deputy Under Secretary of Defense, Advanced Systems & Concepts**
 - **no internal distribution policy or mechanism for DoD developed and paid for software code (i.e., data rights)**
 - **No DoD internal distribution creates an arbitrary scarcity of its own software code, which increases the development and maintenance costs of information technology across DoD**
 - **Other negative consequences include:**
 - lock-in to obsolete proprietary technologies**
 - the inability to extend existing capabilities in months vs. years**
 - snarls of interoperability that stem from the opacity and stove-piping of information systems**



ISSUES WITH INTELLECTUAL PROPERTY RIGHTS

- Programs do not anticipate long-term or enterprise-wide implications when developing their acquisition strategies that address Intellectual Property Rights (IPR)
- Funding is not aligned to build and maintain “families of components” and acquire the appropriate IPR, hindering reuse
- The full impact of IPR often does not manifest itself until programs attempt to upgrade systems, at which point they learn how IPR restricts upgrade options
- The lack of a clearly defined IPR strategy before contract award complicates system certification. Procurement documents must clearly specify how the Navy will get access to source code and related information and that these materials must reside with the government for an unlimited amount of time to allow for system certification and other purposes.

**We strive for
Government Purpose
Rights (GPR) in
contracts to facilitate
movement towards
common solutions and
reuse among systems**



**... However, we will
accept more restrictive
rights when the
business case warrants
and allow proprietary
solutions to ride on the
Navy-owned
architecture.**



FY2007 NDAA § 802(a) - DoD Implementation

- **DoD Instruction 5000.02 (12/08/08) -- Encl. 12, ¶ 9**
 - ~ “codification” of USD(AT&L) Memo, Data Management and Technical Data Rights, 19 July 2007

- **DFARS 2006-D055, Additional req'ts relating to tech data rights**
 - **Added DFARS 207.106(s-70)**
 - **Amended DFARS 227.7103-1(f) & 227.7203-1(e)**
 - **Interim Rule: 72 FR 51188, September 06, 2007**
 - **Final Rule: 74 FR 68699, December 29, 2009**

- **NOTE: long-standing guidance**
 - **DFARS 227.7103-2 & 7203-2 ... dating from 1995...1988...1960s**
 - **USD(AT&L)'s guidebook "IP: Navigating Through Commercial Waters" - October 2001**



FY2007 § 802(b) & FY2008 § 815(a)(2)

- **Special presumptions of Development Exclusively at Private Expense (DEPE):**
 - **Since 1995 - the “Commercial Rule”:**
Commercial Items → must presume DEPE ...
 - **. . . Unless it's a Major System → presume developed exclusively at Govt expense (DEGE) (“Major Systems Rule”). . .**
 - **. Unless it's COTS → then the Commercial Rule**
 - **DFARS Case 2007-D003, “Presumption of Development [Exclusively] at Private Expense”**
 - **Proposed Rule: 75 FR 25161, May 7, 2010**
 - **Final Rule: 76 FR 57144, September 20, 2011**
-



DoDI 5000.02 - Encl. 12, Systems Engineering

9. DATA MANAGEMENT AND TECHNICAL DATA RIGHTS

a. Program Managers for ACAT I and II programs, regardless of planned sustainment approach, shall assess the long-term technical data needs of their systems and reflect that assessment in a Data Management Strategy (DMS). The DMS shall:

- (1) Be integrated with other life-cycle sustainment planning** and included in the Acquisition Strategy;
- (2) Assess the data required to design, manufacture, and sustain the system, as well as to support re-competition for production, sustainment, or upgrades;** and
- (3) Address the merits of including a priced contract option for the future delivery of technical data and intellectual property rights** not acquired upon initial contract award and shall consider the contractor's responsibility to verify any assertion of restricted use and release of data.

b. The DMS shall be approved in the context of the Acquisition Strategy prior to issuing a contract solicitation.



FY09 NDAA - IP related sections

- **Sec. 803. Commercial Software Reuse Preference.**
- **Sec. 822. Technical Data Rights: More on data/rights in acquisition strategies & life cycle planning**
 - **For "non-FAR transactions"**
 - **Report on implementation of FY07 § 802(a)**
- **Sec. 824. Modification And Extension Of Pilot Program For Transition To Follow-On Contracts Under Authority To Carry Out Certain Prototype Projects.**
- **Sec. 825. Clarification Of Status Of Government Rights In The Designs Of Department Of Defense Vessels, Boats, Craft, And Components Thereof.**
- **Sec. 881. Expansion Of Authority To Retain Fees From Licensing Of Intellectual Property.**



FY10 NDAA § 821

- **Support contractor access to proprietary tech data**
 - **Defined “Covered Government Support Contractor”**
 - **USG may release proprietary tech data to [CGSC]**
 - **CGSC will-**
 - **Protect & use only for performance of the USG contract**
 - **Enter into a non-disclosure agreement (NDA) directly with the Owner of the proprietary data**

 - **DFARS Case 2009-D031: Government Support Contractor Access to Technical Data**
 - **Applies to ALL tech data; and NON-commercial software**
 - **“Direct” NDA is at the discretion of the Owner of the data/software**
 - **Interim Rule: 76 FR 11363 (March 02, 2011)**
 - **Final Rule: ___ FR _____**
-



FY2011 NDAA -- §§ 801 & 824

- **§ 801: Litigation Support Contractors access to proprietary data**
 - Similar to approach for “Covered Govt Support Contractors” (DFARS 2009-D031)
 - No “direct NDA” requirement
 - DFARS Case 2011-D018:
 - Interim Rule: ____ FR _____

 - **§ 824: IR&D and B&P funding; Erroneous Assertions**
 - Treatment of Independent R&D (IR&D), and Bid & Proposal (B&P) funding → as either Private or Govt funding
 - Special Procedures for Erroneous Assertions of Restrictions on Data Related to Items Developed Exclusively at Govt Expense
 - DFARS Case 2011-D022:
 - Proposed/Interim Rule: ____ FR _____
-



FY2011 NDAA Section 824 - Now

OBE! (see FY2012 NDAA Section 815)

■ **Treatment of IR&D and B&P funding**

- Historically: treated as PRIVATE funding
- Now --

- Treated as PRIVATE \$\$ when otherwise DE[P]E*

- Treated as GOVT \$\$ when otherwise DE[G]E*

* NOTE: DE[?]E = Developed Exclusively at [?] Expense
[?] = P → Private or G → Government

■ **Special Procedures for Erroneous Assertions of Restrictions on Data Related to Items Developed Exclusively at Govt Expense**

- Govt can require UR as condition of award/responsive
- No time limits on challenging assertion of restrictions



FY 2012 NDAA - Section 802

- ***§ 802, Disclosure to Litigation Support Contractors.*** Added new section 10 U.S.C. § 129d, *Disclosure to litigation support contractors*, which essentially relocated the scheme implemented at 10 U.S.C. 2320 to authorize Covered Litigation Support Contractors access to proprietary technical data (pursuant to § 801 of the FY2011 NDAA, above), and expanded that scheme to cover other types of proprietary data, including confidential commercial, financial, or proprietary information, technical data, or other privileged information.” The section repealed all of the previous revisions to 10 U.S.C. 2320 made pursuant to § 801 of the FY2011 NDAA, above.
 - **Note:** DFARS Case 2012-D029, *Disclosure to Litigation Support Contractors*, was initiated on 25 Jan 2012, to implement this new requirement (and supersede former DFARS Case 2011-D018, *Disclosure to Litigation Support Contractors*, which was initiated to implement FY10 NDAA § 801, and which was at Office of Information and Regulatory Affairs (OIRA) for pre-publication coord when the FY12 NDAA passed).
-



FY 2012 NDAA - Section 815

- **§ 815: Rights in Technical Data and Validation of Proprietary Data Restrictions.**
 - **Paragraph (a) - *Rights in Technical Data.***
 - Adds new subparagraph (a)(2)(D)(i)(II), which authorized technical data “necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes” (hereafter segregation/reintegration data), to be released outside the Government even if it was developed exclusively at private expense.
 - Revises paragraph (a)(2)(E) to expressly recognize that the Government will have government purpose rights in data related to technology developed with mixed funds, except when negotiation of different rights is in the Government’s interest.
 - Retroactively reverses in its entirety the changes to paragraph (a)(3) made by § 824(b) of the FY2011 NDAA (above), restoring the long-standing rule that IR&D and B&P are treated as private expense.
 - Adds new subparagraph (b)(9), which allows the Government to order, at any time after award, certain types of technical data that are determined to be necessary for the “reprocurement, sustainment, modification, or upgrade (including through competitive means) of a major system or subsystem thereof, a weapon system or subsystem thereof, or any noncommercial item or process.” This authority covers data related to technology developed in whole or in part with Government funds, and to segregation/reintegration data.”
 - Adds new subparagraph (b)(10), which provides that the Government is “not foreclosed from requiring the delivery of the technical data by a failure to challenge, in accordance with the requirements of [10 U.S.C. § 2321(d)], the contractor’s assertion of a use or release restriction on the technical data.”
 - **Paragraph (b) - *Validation of Proprietary Data Restrictions.*** Amends § 2321(d)(2) to change the challenge period from three years to six years, and to expand the scenarios in which there is no time limit on Government challenges to include “are the subject of a fraudulently asserted use or release restriction.”.
 - **DFARS Case 2012-D022, *Rights in Technical Data and Validation of Proprietary Data Restrictions*, was initiated on January 11, 2012, to implement these new changes (and to supersede former case 2011-D022, by the same name).**
 - **Note: this provision affects § 824 of the FY2011 NDAA (above).**
-



EXAMPLES OF RFP EQUIREMENTS

- **Contractor will be required to define, document, and follow an open systems approach for using modular design, standards-based interfaces, and widely-supported consensus-based standards.**
 - **The Contractor shall develop, maintain, and use an open system management plan to demonstrate compliance that plan during all design reviews.**
 - **As part of an open system management plan, the Contractor will be required to identify to the Government all Commercial-Off-the-Shelf/Non-development Item (COTS/NDI) components, their functionality, and provide copies of license agreements related to the use of these components for Government approval prior to use.**
 - **The proposed open system management plan will be incorporated into the contract with any changes, alterations, and/or modifications requiring Government approval.**
-



OPEN SYSTEMS MANAGEMENT PLAN

- **Contractor shall describe its rationale for the modularization choices made to generate the design**
- **Contractor's rationale must explicitly address any tradeoffs performed, particularly those that compromise the modular and open nature of the system**
- **Contractor shall specify how it plans to use MOSA:**
 - **to enable the system to adapt to evolving requirements and threats;**
 - **Accelerate transition from science and technology into technology and deployment;**
 - **Facilitate systems reconfiguration and integration;**
 - **reduce the development cycle time and total life cycle cost;**
 - **maintain continued access to cutting edge technologies and products from multiple suppliers; and**
 - **mitigate the risks associated with technology obsolescence, being locked into proprietary or vendor-unique technology, and reliance on a single source of supply over the life of the system.**



OPEN SYSTEM MANAGEMENT PLAN TREATMENT OF PROPRIETARY OR VENDOR-UNIQUE ELEMENTS

- **The Contractor shall explain the use of proprietary, vendor-unique or closed components or interfaces**
- **If applicable, the Contractor will define its process for identifying and justifying proprietary, vendor-unique or closed interfaces, code modules, hardware, firmware, or software to be used**
- **When interfaces, hardware, firmware, or modules that are proprietary or vendor unique are required, the Contractor shall:**
 - **demonstrate to the Government that those proprietary elements do not preclude or hinder other component or module developers from interfacing with or otherwise developing, replacing, or upgrading open parts of the system.**



RFP REQUIREMENTS REGARDING FUTURE SYSTEM UPGRADES

- **Future System Upgrades - The offeror shall provide a detailed description of how a modular design strategy will be demonstrated in all aspects of future system upgrades**
 - **In addressing the specified requirements, the proposal, at a minimum, must demonstrate how the modular design strategy applies, and the effect it will have on future systems upgrades**
 - **The proposal shall describe an orderly planned process to address migration of proprietary, vendor-unique, or closed system equipment or interfaces to a modular open systems design when technological advances are available or when operational capability is upgraded. The proprietary, vendor-unique or closed systems implementation shall also be reflected in the Offeror's system level life cycle cost estimates**
 - **The modular design approach shall either mitigate or partition - at the lowest subsystem or component level -- proprietary, vendor unique or closed system implementation to avoid out-year supportability issues and diminished manufacturing and repair sources**



DATA RIGHTS SPECIFIC CLAUSES NON-COMMECIAL

- **Rights in Noncommercial TD, Noncommercial CS, and Noncommercial CSD. The Offeror shall provide the following information as attachments to its offer:**
 - **The 7017 List. The Offeror shall attach to its offer a list identifying all noncommercial TD, CS, and CSD that it asserts should be delivered with other than unlimited rights**
 - **The 7028 List. The Offeror shall attach to its offer a list identifying all noncommercial TD, CS, and CSD that it intends to deliver with other than unlimited rights and that are identical or substantially similar to TD, CS, or CSD that the Offeror has delivered to, or is obligated to deliver to, the Government under any contract or subcontract**
 - **Supplemental Information. The Offeror shall attach to its offer a statement, entitled “Supplemental Information—Noncommercial Technical Data, Noncommercial Computer Software, Noncommercial Computer Software Documentation” (the statement) that, for each item of noncommercial TD, CS, or CSD that the Offeror asserts should be delivered with specifically negotiated license rights or other non-standard rights**



DATA RIGHTS SPECIFIC CLAUSES COMMERCIAL

- **Rights in Commercial TD, Commercial CS, and Commercial CSD.**
 - **Unique to OA Guidebook**
 - **The Offeror shall attach to its offer a list, entitled “Commercial Technical Data, Commercial Computer Software, and Commercial Computer Software Documentation-Government Use Restrictions” (the Commercial Restrictions List), that provides the following information regarding all commercial TD, CS, and CSD that the Offeror (including its sub-Offerors or suppliers, or potential sub-Offerors or suppliers, at any tier) intends to deliver with other than unlimited rights: (1) identification of the data or software; (2) basis for asserting restrictions; (3) asserted rights category; and (4) name of the person asserting restrictions**
 - **The Offeror shall attach to its offer a list, entitled “Commercial-Off-the-Shelf (COTS) Licenses - Identification and Licensing” (the COTS List), providing information concerning all COTS licenses for which it intends to pay license fees and the amount of the fees in order to perform under the contract**



OPEN ARCHITECTURE GUIDEBOOK

RECOMMENDED AWARD FEE LANGUAGE

- **For “Performance and Schedule” portion of the Award Fee Plan, the Government should consider applying the following OA-related award fee criteria:**
 - **Ability to incorporate considerations for re-configurability, portability, maintainability, technology insertion, vendor independence, reusability, scalability, interoperability, upgradeability, and long-term supportability as defined by Naval Open Architecture**
 - **Ability to implement a layered and modular system that makes maximum use of non-proprietary Commercial-Off-the-Shelf / Non-developmental Item (COTS/reusable NDI) hardware, operating systems, and middleware**
 - **Ability to minimize inter-component dependencies and allow components to be decoupled and reused, where appropriate**



Definitions in the Clauses

- **ALL of the types of deliverables**
 - "Technical Data" and its sub-type "[CS] Documentation"
 - "Computer Software" and its sub-type "Computer program"
 - "Computer database"
 - "Commercial item" and "commercial computer software"
- **ALL of the defined license categories**
 - "Unlimited Rights"
 - "Government Purpose Rights" (and "GOVT Purposes")
 - "Limited Rights" and "Restricted Rights"
- **Standards/criteria for determining funding**
 - "Developed" (*i.e.*, first created or reduced to practice)
 - "Developed exclusively at private expense"
 - "Developed with mixed funding"
 - "Developed exclusively with government funds"



Tech Data and Computer Software

- **Technical Data: any recorded information of a scientific or technical nature**
 - Includes computer software documentation

- **Computer Software:**
 - Computer Programs: executable or object code - causes a computer to perform a function

 - Source code and design details (e.g., flowcharts, design documentation, etc)

- **Issues:**
 - "Databases" ... data . . . Or software?



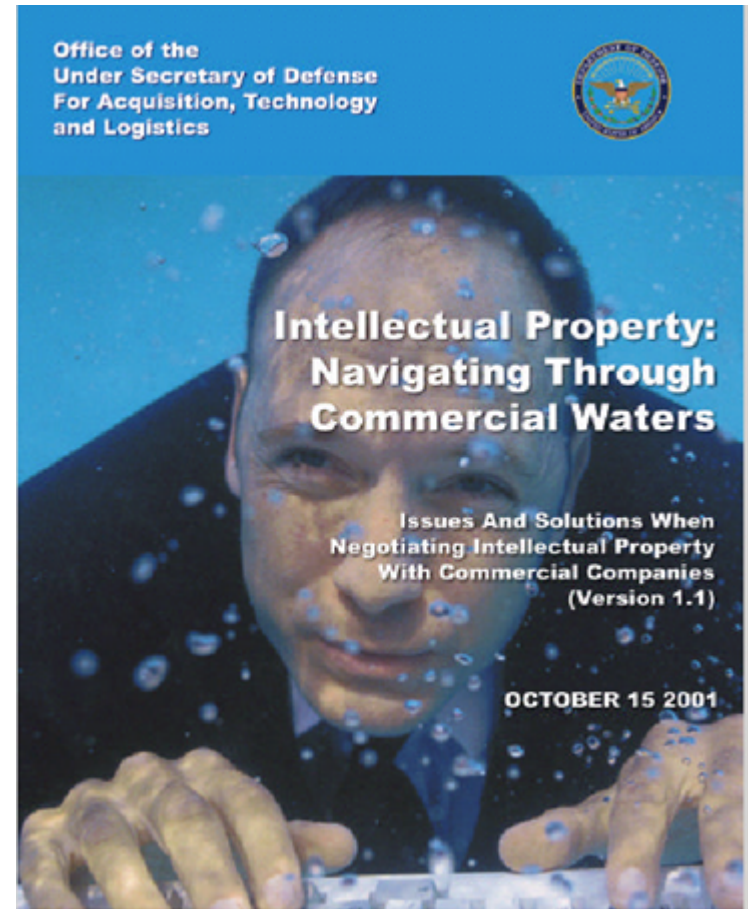
IP Basics for Everyone - The Guidebook

USD(AT&L) Guidebook:

Navigating Through Commercial Waters: Issues and Solutions When Negotiating Intellectual Property With Commercial Companies

(Ver. 1.1, 15 Oct 2001)

**See [http://www.acq.osd.mil/dpap/
specific
policy/intellectualproperty.html](http://www.acq.osd.mil/dpap/specific/policy/intellectualproperty.html)**





Definitions in the Clauses

- **ALL of the types of deliverables**
 - "Technical Data" and its sub-type "[CS] Documentation"
 - "Computer Software" and its sub-type "Computer program"
 - "Computer database"
 - "Commercial item" and "commercial computer software"
 - **ALL of the defined license categories**
 - "Unlimited Rights"
 - "Government Purpose Rights" (and "GOVT Purposes")
 - "Limited Rights" and "Restricted Rights"
 - **Standards/criteria for determining funding**
 - "Developed" (*i.e.*, first created or reduced to practice)
 - "Developed exclusively at private expense"
 - "Developed with mixed funding"
 - "Developed exclusively with government funds"
-



Tech Data and Computer Software

- **Technical Data:** any recorded information of a scientific or technical nature
 - Includes computer software documentation

- **Computer Software**
 - **Computer Programs:** executable or object code - causes a computer to perform a function

 - Source code and design details (e.g., flowcharts, design documentation, etc)

- **Issues:**
 - "Databases" ... data . . . Or software?
 - Software design details ... just tech data related to a program?



Data Deliverable vs. Data Rights

- **MUST specify Delivery Requirements**
 - NO delivery requirements in the clauses
 - Well *Deferred Ordering* is nice (DFARS 252.227-7027)
 - **Specify three aspects for each deliverable (See "Navigating....")**
 - **Content** (e.g., level of detail or nature of information)
 - Critical: distinguish human-readable source code from machine-readable object/executable code
 - **Recording/storage format** (e.g., image files vs. word processing format)
 - **Delivery/storage medium** (e.g., CD-ROM, or on-line access).
 - **Defined by**
 - Specification: CDRLs and DIDs
 - Performance-based: data/software necessary for ...
-



The "Hybrid" License

➤ Copyright

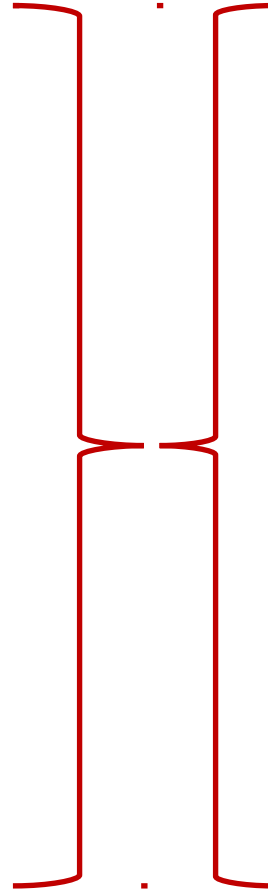
- Reproduce
- Prepare Derivatives
- Perform
- Display
- Distribute

➤ Trade Secret

- Any/all activities
- Focus on release & disclosure

➤ "Data Rights"

- Use
- Reproduce
- Modify
- Perform
- Display
- Release
- Disclose
- *[FAR: distribute]*
- *Access? (see DFARS 227 rewrite)*





DATA AND SOFTWARE BASICS

- **Acquire only the MINIMUM**
 - **Deliverables ... AND**
 - **License Rights . . .**
. . . necessary to meet DoD needs!!!

- **Commercial - only the "usual" commercial . . .**
 - **Deliverables ← with limited exceptions...**
 - **License rights ← except as otherwise mutually agreed**

- **Specify the deliverables (priced [option] CLINS)**
 - **NO help from clauses → case-by-case for each effort**



DATA & SOFTWARE BASICS

- **Cannot , as a condition of award , require Contractors to relinquish certain minimum rights . . . (may consider rights offered as part of the best value determination)**
 - **Early Identification & Assertion of Restrictions**
 - **DFARS clause for Noncommercial**
 - **MUST supplement for commercial!!!!**
 - **Definitions are CRITICAL . . . do NOT underestimate**
 - **Specialized "validation" process**
 - **Subcontracting issues . . . same rules . . . ~almost privity**
-



ARE THERE ANY OPEN ARCHITECTURE GUIDES?

The Guidebook is primarily for development contracts for component based architectures and includes:

- Recommended language for Sections C, L, and M
- Recommended award fee criteria for “Performance and Schedule” and “Work Relations”
- Appendices:
 - Recommended Naval OA Contract Data Requirement List (CDRL) and deliverable items
 - Recommendations for assessing a program’s intellectual property rights needs
 - Recommendations for using Small Business Innovation Research contracts to support Naval OA goals
 - Naval OA “Quick Checklists” to help drafters and reviewers





NAVAL OA CONTRACT GUIDEBOOK

- **Naval Open Architecture Contract Guidebook**
 - **Ver 2.0 - 20 June 2010**
 - **<https://acc.dau.mil/oa>**
 - **Overview & Table of contents**
 - **Section C - Statement of Work**
 - **Section H - Special Contract Requirements**
 - **Section L - Instructions to Offerors**
 - **Section M - Evaluation Factors**
 - **CDRLs**
 - **Incentivizing contractors**
 - **Appendices (markings, check lists, etc)**
-



Naval OA Contract Guidebook - Detailed TOC

- **Introduction**
 - **Chapter A: Recommendations For Section C (Statement Of Work) Language**
 - **Chapter B: Examples Of Section H (Special Contract Requirements) Language**
 - **Chapter C: Recommendations For Section L (Instructions To Offerors) Language**
 - **Chapter D: Recommendations For Section M (Evaluation Criteria) Language**
 - **Chapter E: Recommendations For Incentivizing Contractors**
 - **Appendix 1: Recommended NOA CDRL And Deliverable Items**
 - **Appendix 2: NOA Checklist (Short)**
 - **Appendix 3: NOA Checklist (Long)**
 - **Appendix 4: Recommended Data Language For Code Headers**
 - **Appendix 5: Open Source Software**
 - **Appendix 6: Glossary Of Terms**
-



NAVAL OA CONTRACT GUIDEBOOK

Section C considerations & recommendations

- **Relationships: SOW $\leftrightarrow$ CDRLs $\leftrightarrow$ DIDS**
- **Treatment of Proprietary/Vendor-Unique**
- **Interface control & open standards**
- **Re-Use of technology**
- **Information for 3rd Party Development/Competition**



NAVAL OA CONTRACT GUIDEBOOK

Section H considerations & recommendations

- **Open Systems Management Plan**
 - **Approach for managing all aspects of the SOW**
- **Early & Often Technical Disclosure**
- **Rights in Commercial Technology (~7017 equiv)**
- **Specially Negotiated License (→GPR for all)**



NAVAL OA CONTRACT GUIDEBOOK

Section L considerations & recommendations

- Factor: Technical Approach
 - Subfactor: Treatment of Proprietary/Vendor-Unique (explain & justify)
- Factor: Data Rights & Patent Rights:
 - EXPLAIN the extent to which approach ensures [... see next slide § M for detailed elements]
 - Detailed Listings
 - Noncommercial Data Lists & supplemental info
 - Commercial Data Lists & supplemental
 - Background Inventions
- Cost/Price Info for Licenses for...
 - All the data/inventions listed above



NAVAL OA CONTRACT GUIDEBOOK

Section M considerations & recommendations

- **Factor: Technical Approach & Process**
 - **Subfactor: Treatment of Proprietary/Vendor Unique**
- **Factor: Data Rights, Computer Software Rights and Patent Rights: ...assess the **extent to which** the rights in [data & inventions] ensure -**
 - **unimpeded, innovative, and cost effective production, operation, maintenance, and upgrade of the [SYSTEM NAME] throughout its life cycle;**
 - **allow for open and competitive procurement of [SYSTEM NAME] enhancements; and**
 - **permit the transfer of the [SYSTEM NAME] non-proprietary object code and source code to other contractors for use on other systems or platforms.**



NAVAL OA CONTRACT GUIDEBOOK

Summary of Key Elements

- **Preference** for open, common, re-usable, replaceable, upgradable, competitive, multiple sources, rapid tech insertion
- **EXPLAIN** and justify the use of proprietary w/in Overall Approach
- Isolate proprietary at lowest levels - “Plug and Play”
 - Open interface to the proprietary module
 - Form, fit, function info for the proprietary module
- Fully explain/list the asserted restrictions for ALL data & IP
- **BEST VALUE** evaluation of the approach, including technical challenges, supportability, and cost impacts for proprietary